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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 254

THEODORE STOVALL,

Petitioner,

vs.

HONORABLE WILFRED DENNO, Warden.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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Opinions Below

The opinion of the Court of Appeals sitting in banc is reported at 355 F. 2d 731 and is set forth at R. 37-59. The panel opinion, vacated by the in banc decision, is not reported and appears at R. 24-35. The district court opinion (R. 14-18) is not reported.

Jurisdiction

The judgment of the Court of Appeals (panel) was entered on March 31, 1965, and vacated January 31, 1966 (R. 60) when the judgment of the in banc court was en-

tered (R. 61). The petition for a writ of certiorari was filed on April 19, 1966, and granted on June 20, 1966 (R. 62).

The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

Question Presented

Whether the Petitioner, arraigned, tried and convicted of a capital offense, was denied his rights under the Fifth, Sixth and Fourteenth Amendments when after arraignment and request for counsel he was taken by police officers to the hospital room of one of the victims and there, without counsel, was compelled to speak, to expose his person, and to otherwise comport himself in a manner calculated to facilitate his identification; evidence of such identification then being used at Petitioner's subsequent trial to secure conviction.

Summary Statement of Facts

Procedural Background

Theodore Stovall was convicted of Murder in the First Degree in the County Court, Nassau County and on September 6, 1962 was sentenced to death.[1] Upon direct appeal to the New York Court of Appeals the judgment was affirmed without opinion (13 N.Y. 2d 1094) and the remittitur amended upon a *pro se* application (13 N.Y. 2d 1178). No application was made to this Court for a writ of certiorari.

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[1] A stay of execution was granted by the Second Circuit on October 15, 1964 and remains in force "pending further order of [that] Court." (Proceedings, CA-2, p. 41a)

Petitioner then applied, *pro se*, to the district court below for a writ of habeas corpus alleging (1) illegal search and seizure; (2) that his being forced to accompany police to a hospital for the purpose of being identified violated his rights under the Fifth and Fourteenth Amendments at a time when the Petitioner had already been arraigned on the capital charge but was not then represented by counsel (R. 5); and (3) that assigned counsel in the New York courts had failed to file a petition for writ of certiorari after representing to the Petitioner that he would do so (R. 5-7).[2]

After assigning counsel and hearing argument the district court dismissed the writ. Upon appeal to the Second Circuit the dismissal was reversed and the case remanded with directions to sustain the writ unless Petitioner was retried within a reasonable time. Upon rehearing in banc the panel decision was vacated and the district court judgment affirmed.

The Relevant Facts[3]

At approximately 12:30 a.m. on August 24, 1961, Doctor Paul Behrendt was stabbed to death and his wife wounded in their home in Garden City, Long Island. By approximately 4:00 p.m. that day the Petitioner had been taken

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[2] This claim has never been pressed by counsel in these proceedings on the assumption that the habeas forum is at least as broad as certiorari review and the Petitioner was therefore not prejudiced by the failure of counsel to proceed further after representing that he would do so. *Fay* v. *Noia*, 372 U.S. 391, 435-38 (1963).

[3] Our presentation here is limited to those facts directly bearing upon the issues raised by this case. A detailed analysis of the state record is set forth as an appendix (*infra*, pp. 21-54).

into custody. Through the remainder of the day and night Stovall was questioned and taken from place to place in connection with the investigation. Although certain admissions were elicited during the interrogation the Petitioner steadfastly maintained his innocence and ignorance of the crime.[4]

In the morning of the following day the Petitioner was brought before a Judge of the First District Court, Nassau County, where he was arraigned upon a charge of Murder in the First Degree under Penal Law, § 1044(1), a crime which carries a mandatory death penalty upon conviction.

After reading the complaint, the Court told the Petitioner:

> The Court: * * * The charge against you is violating Section 1044 subdivision 1 of the Penal Law of the State of New York, which is murder in the first degree. You have the right to the aid of a lawyer or counsel in every stage of the proceeding and before any further proceedings are had. Do you want to get a lawyer? If you do I'll give you time to get one before we proceed at this particular time.
>
> The Defendant: Yes, sir.
>
> The Court: Now, I wish to advise that—you're getting your own lawyer, is that right?
>
> The Defendant: Yes, sir.

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[4] The *pro se* habeas petition raises no claim relating to the use of the admissions. The majority opinion of the *in banc* court erroneously states that Stovall made "no statements or confessions whatsoever" (R. 39). In the statement admitted into evidence Stovall acknowledged that the keys and torn shirt found within a few feet of Dr. Behrendt's body were his but he denied knowledge as to how they got there (Folios 4759-60).

The Court: All right, I'll put it over to August 31st, next Thursday, for the purpose of getting an attorney. The defendant is remanded pending further pleading. That's all. (R. 20)

The "remand" of Petitioner was pursuant to Section 192 and 193 of the New York Code of Criminal Procedure which require that a remanded defendant be committed to the custody of the sheriff. However instead of being turned over to the sheriff, Stovall was taken by detectives from the courtroom,

> ". . . handcuffed to one of them, to the hospital where Mrs. Behrendt had undergone extensive surgery, and into her room. Three high police officers and two prosecutors were also there. One of the police officers asked Mrs. Behrendt whether Stovall was 'the man'; she said he was. At some time one of the officers asked Stovall 'to say a few words for voice identification'; he did—just what does not appear" (opinion Friendly, C.J.; R. 27).

On August 31st, the adjourned date of the arraignment, the Petitioner was brought back to the First District Court and asked by the judge then presiding:

> "The Court: You were advised that you were given time until today, August 31, to return here with a lawyer. Have you obtained counsel?
>
> Mr. Stovall: I have requested for one, sir.
>
> The Court: You have requested. Who did you request?
>
> Mr. Stovall: I requested the jailhouse where I was at for a lawyer.

The Court: Well, did you get in touch with any of your relatives to see if they would get counsel for you, or a lawyer for you?

Mr. Stovall: No, I didn't.

The Court: Well then, what were you advised over in the jail?

Mr. Stovall: They said I would get one. They told me to write a letter to the warden and he said I would be assigned a lawyer. (R. 21-22).

The Judge then assigned Stovall an attorney from among those present in the courtroom and after a brief conference a hearing upon the complaint was demanded and set down for the following day (R. 22).

Almost a year later Stovall was brought to trial upon a charge of murder in the first degree. In his opening the district attorney told the jury,

"There will be further evidence that Mrs. Behrendt observed this defendant while she was in the hospital and the defendant was taken to her. She identified him. I don't believe that she has ever seen him since, and whether she will be able to identify him here in court. I do not know at this time. But she will be called. * * * " (Folios 237-38)[5]

Prior to Mrs. Behrendt's testimony defense counsel cross examined those officers present in the hospital room as to the alleged suggestive nature of the hospital identification, bringing out that Stovall, in handcuffs, was the

[5] All references by Folio are to the printed volumes of the Record on Appeal to the New York Court of Appeals which is part of the district court record on file with the Clerk of this Court.

lone Negro in the room with seven white officers when the identification took place and that he had been told to "say these words" for voice identification (Folios 1803-05).

Mrs. Behrendt identified the defendant at trial as her assailant and the killer of her husband. Without objection she testified that she had previously seen the defendant when he had been brought into her hospital room two days after the killing and assault (Folios 2075, 76). On cross examination she said that prior to the hospital room identification she was told "they would bring a suspect" in (2268).

The sole defense offered by Stovall, who did not testify, was that the crime had been committed by one of the prosecution's witnesses. (See *infra*, Appendix pp. 46, 48-49). Upon summation defense counsel referred to the hospital identification procedure as a "crucifixion" and that the manner in which it was conducted would have resulted in Mrs. Behrendt's identifying anyone brought before her (See Folios 4025-26).

ARGUMENT

Introduction

The Petitioner was arraigned in the morning of August 25, 1961 upon a complaint charging murder in the first degree. The arraignment minutes show that the Petitioner was not advised of his right to assigned counsel, as is required by New York law,[6] and the subsequent adjourned arraignment minutes show the Petitioner's inability to re-

[6] *People* v. *Witenski*, 15 N.Y. 2d 392 (1965).

tain counsel and utter lack of comprehension of the manner in which to assert his right to assigned counsel (R. 21-22).

Notwithstanding the fact that Petitioner was on August 25th, "remanded . . . pending further pleading" he was returned to the custody of his accusers in violation of state law which requires a commitment to the sheriff.[7]

He was then taken by the two officers to the hospital room of the wife of the deceased and there made to speak "these words" for voice identification and to present himself to the victim-witness for corporal identification. This exposure of the Petitioner resulted in a positive identification by Mrs. Behrendt less than forty-eight hours after the homicide. Testimony of this identification was used at trial pursuant to Section 393(b) of the Code of Criminal Procedure which allows such testimony both as independent proof of identity and as corroboration of an in-court identification. *People* v. *Spinello,* 303 N.Y. 193 (1951).[8]

The identification testimony of Mrs. Behrendt was the only direct evidence of Petitioner's guilt. The prior identification in Mrs. Behrendt's hospital room was not the result of a "line-up" or "identification parade" but rather was the product of a "show-up", i.e., where only one person is produced to be identified.

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[7] Code of Criminal Procedure, §193. Upon argument before the panel, the District Attorney of Nassau County stated that the sheriff of Nassau County does not have a representative available in the arraigning courts and that responsibility for placing committed defendants in his hands rests with the police (Panel opinion, Friendly, C.J., at R. 26-27).

[8] Prior to the enactment in 1927 of Section 393(b), New York followed the common law rule which excluded all evidence of prior identification. *People* v. *Jung Hing,* 212 N.Y. 393 (1914).

This identification device has been condemned by every legal scholar considering it. Dean Wigmore, perhaps the strongest critic of such techniques, wrote:

> "... there is no excuse for jeopardizing the fate of innocent men by such clumsy, antiquated methods; a recognition under such circumstances is next to worthless."
>
> 4 Wigmore, *Evidence*, §1130, n.2

Professor Borchard in his *Convicting the Innocent*, at p. 84 (1932) states the grounds for discounting such evidence:

> "The emotions of the victim ... create a predisposition to believe the worst of a person brought before him as a probable offender, especially where there is no alternative suspect."

As bad as the "show-up" may be, this case presents an identification made under more aggravating circumstances.

In 3 Wigmore, *Evidence*, §786a (3rd Ed. 1940) at p. 164, n. 2 an instance is reported where:

> "... to identify a burglar, the police brought the arrested man *handcuffed into the presence of the women* whose jewelry had been stolen!" (emphasis in original)

According to Wigmore, "the suggestion of identity could not have been more violent." Wigmore, *Corroboration by Witnesses Identification of an Accused on Arrest*, 25 Ill. L. Rev. 550 at 551 (1931).

Contrary to Dean Wigmore, the suggestion of identity *could*, and here was, more violent; for the accused, of a dif-

ferent race than the victim, was compelled to speak and stand surrounded by seven officers not of his race.

Justice Frankfurter, who could have been commenting on this case, wrote

> "In the Sacco-Vanzetti case the elements of uncertainty were intensified. All the identifying witnesses were speaking from casual observation of men they had never seen before, men of foreign race, under circumstances of unusual confusion . . . Moreover, the methods pursued by the police in eliciting identification fatally impaired its worth. In England, such methods would have discredited the testimony and nullified a verdict based upon it. The recognized procedure is to line up the suspect with others, and so far as possible with individuals of the same race and class, so as not to provoke identification through accentuation. In defiance of these necessary safeguards, Sacco and Vanzetti after their arrest were shown singly to persons brought there for purposes of identification, not as part of a 'parade' [i.e., line-up]. Moreover, Sacco and Vanzetti were not even allowed to be their natural selves; they were compelled to simulate the behavior of the Braintree bandits. Under such conditions identification of foreigners is a farce."[9]

In England the use of the show-up generally resulted in the quashing of convictions based upon evidence obtained through these means. See, *Dickman* [1910], 5 Crim. App.R. 135, 142-43; *Chapman* [1911], 7 Crim. App.R. 53, 55-56; *Williams* [1912], 8 Crim. App.R. 84, 88.

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[9] Frankfurter, The Case of Sacco and Vanzetti (Universal Library Edition, 1962) at 31-32. See also, Borchard, *supra*, at 64.

Current English practice prevents any such show-up or bogus line-up as was conducted here. In England the suspect is entitled to be presented for viewing with persons of his own age, general appearance, and the like and he is entitled to have his solicitor or friend present. Wall, *Eye Witness Identification in Criminal Cases*, 40-65 (1965); *Extract from Home Office Consolidated Circular to Police* (1925) (quoted at 3 Wigmore, *Evidence*, pp. 164-165 [3rd Edition]); Glanville Williams, *Identification Parades*, [1955] Crim. L. Rev. (Eng.) 525, 527-28.

Prior to the publication of Mr. Wall's book the problem of pre-trial identification procedures had been treated by American courts as one going to the weight of the prior identification. Following its publication we have, beginning with *Stovall*, the consideration of the constitutional barriers to the admissibility of such evidence.[10] As raised here Petitioner claims three separate, albeit overlapping, violations of constitutional right by the identification procedure followed in this case.

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[10] See, e.g., *Wade* v. *United States*, 358 F. 2d 557 (5th Cir.) *cert. granted*, No. 334, O.T. 1966; *People* v. *Gilbert*, 47 Cal. Rptr. 909, 408 P. 2d 365, *cert. granted*, No. 223, O.T. 1966; *Palmer* v. *Peyton*, 359 F. 2d 199 (4th Cir., 1966); *Golliher* v. *United States*, 362 F. 2d 594 (8th Cir., 1966); *Gilbert* v. *United States*, —— F. 2d —— 35 U.S. Law Week 2170 (9th Cir., Sept. 16, 1966); *Rigney* v. *Hendrick*, 355 F. 2d 712 (3rd Cir.); *United States* v. *Chubbuck*, 361 F. 2d 365 (3rd Cir., 1966).

I.

The Prior Identification Was Obtained After Arraignment on a Capital Charge and in Violation of Petitioner's Rights Under the Sixth Amendment.

When the Petitioner was arraigned on August 25th, he became a defendant in a capital case. His absolute constitutional right to counsel had come into being and the subsequent actions resulted in the denial of the right.[11] Directly flowing from this denial of right was the release of the accused to his accusers and the transporting of the Petitioner to the hospital room where, absent any of the safeguards discussed above, the prosecutor was allowed to create evidence used to secure conviction at the subsequent trial.

The decisions of this Court hold that evidence so secured is absolutely barred from a capital trial, regardless of the absence of trial objection or a defendant's inability to show the extent to which the tainted evidence prejudiced his defense.[12]

The three-judge majority of the *in banc* court, contrary to this Court's holding in *Hamilton* and *White*, asks (at

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[11] In the court of appeals we urged on the authority of a prior Second Circuit decision (*United States ex rel. Weinstein* v. *Fay*, 333 F. 2d 815) that the advice given (R. 19-20) was inadequate and perfunctory and therefore prevented Petitioner from asserting his right to assigned counsel (see, *People* v. *Witenski*, 15 N.Y. 2d 392, which requires detailed enquiry and advice). However, the court below found that Petitioner had asserted his right. While we still maintain that the advice given was inadequate the legal principles involved here are equally applicable to either interpretation of the record.

[12] *Hamilton* v. *Alabama*, 368 U.S. 42 (1961) and *White* v. *Maryland*, 373 U.S. 59 (1963).

R. 48), "what could counsel have done to thwart the identification?" This argument misses the heart of the issue. It is not an attorney's duty to thwart anything, be it an identification, a confession, or conviction. It is an attorney's duty to try and protect his client's rights and insure against over reaching by the prosecution. Had the judge on August 25th made a more searching enquiry concerning Stovall's needs and desires concerning counsel, there would then and there have been an attorney assigned. That attorney, it is true, could possibly have thwarted the release of Petitioner to the detectives,[13] however, and more significantly, counsel could in Stovall's own interest have requested either the court or district attorney to direct that the presentation of Petitioner to Mrs. Behrendt be accomplished under conditions which did not pinpoint him as the person to be identified. Wall, *Eye-Witness Identification in Criminal Cases,* at 43. Failing in all this, counsel could have told Stovall that he did not have to "say these words . . . for voice identification" unless other voices were likewise presented. *Palmer* v. *Peyton,* 359 F. 2d 199 (4th Cir., 1966).

The panel dissent and the *in banc* majority state that the hospital identification was necessary to *protect* Petitioner (R. 34, 40) for it lay in Mrs. Behrendt's lips to exonerate Stovall if he was not the man. While we con-

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[13] In *United States ex rel. Weinstein* v. *Fay, supra,* Chief Judge Lumbard stated in setting aside a New York conviction based upon a confession to burglary obtained after a no-counsel arraignment on a sham vagrancy charge,

> "Furthermore, it is unlikely that the ex parte conference which took place between the magistrate and the police officer would have taken place had the relator been represented by counsel. And it is even more unlikely that he would have been paroled into police custody." (333 F. 2d at 818)

cede the legitimate prosecutional goal of exoneration of the innocent we dispute the premise that a possibly worthy motive can displace the right to counsel. Compare, *Massiah* v. *United States*, 377 U.S. 201, 206-207 (1964).

II.

The Prior Identification Was Obtained Under Conditions Which Were Fundamentally Unfair and Which Violated Petitioner's Rights Under the Fourteenth Amendment.

The "line-up" or "identification parade" is a legitimate tool of police investigation and law enforcement. Where its results are admitted at trial as proof of guilt it should comport with some minimal standard of "fundamental fairness." The prior identification in this case does not meet such a standard, for the out-of-court identification of this accused is infected with every vice about which so much has been written in the last fifty years.[14] As recently stated by a Canadian court:

> "If the means employed to obtain evidence of identification involved any acts which might reasonably prejudice the accused, the value of the evidence may be wholly or partially destroyed. Anything which lends to

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[14] We note that by police regulation the procedure used here is condemned—but only when a police officer is the accused. *The Rules and Procedures of the Police Department of the City of New York*, Chapter 21, §6.1 (1956) provides:

> "In attempting to identify the accused, a line-up of at least six members of the force shall be used if possible. They shall be in uniform or civilian clothes, according to the nature of the complaint. When in uniform, they shall not wear shields or cap devices."

convey to a witness that a person is suspected by the authorities or is charged with an offense, is obviously prejudicial and wrongful. Submitting a prisoner alone for scrutiny after arrest is unfair and unjust." [15]

When compared with the grounds for excluding involuntary confessions, we find that the method of obtaining this evidence of identification contains all those "totality of circumstances" which in the past have voided statements as involuntary.

Here we are dealing with no exclusionary rule designed to prevent consideration of reliable evidence of guilt. We are asking for the exclusion of unreliable evidence obtained in an unfair manner where the unreliability of the evidence increases in direct proportion to the unfairness by which it was obtained.

Notwithstanding the unreliability, as in traditional coerced confession cases, the tainted evidence is devastatingly relevant to the central issue in most criminal trials. To even permit the jury to consider such evidence casts upon the defendant the burden of dislodging from a juror's mind evidence which but for the initial unfairness, might never have existed.

Convictions in criminal cases rarely occur in the courtroom. Usually guilt or innocence is sealed by the pre-trial investigations by counsel for both the state and the defendant and a verdict after trial or guilty plea is merely the culmination of what has gone on before. To be meaningful the concept of fundamental fairness embodied in the Fourteenth Amendment must be applicable to those preliminary

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[15] *Rex* v. *Smierciak* [1947], 2 D.L.R. 156, at 157-58 (Ont.).

stages where in substance the defendant's guilt or innocence is established.

The Petitioner was identified under a procedure which cried out for his selection as the assailant and the unfairness of this identification procedure infected the trial at which the evidence so secured was used.

III.

The Prior Identification Was Obtained Under Conditions Which Violated Petitioner's Rights Under the Fifth Amendment.

Though we do not overlook the force of this Court's opinion in *Schmerber* v. *California,* 384 U.S. 757 (1966), we believe the incident involved here is sufficiently distinguishable to allow for consideration of Petitioner's claim under the self-incrimination provision of the Fifth Amendment.

In *Schmerber,* as here, the Court had before it testimonial evidence obtained by use of the body of the accused. However, there the similarity ends.

The evidence obtained in *Schmerber* was not only of the highest reliability but it was obtained in a "medically acceptable manner." The evidence obtained here fails to meet either of these qualifications. While it might appear that these limitations upon *Schmerber* are applicable only to the Sixth and Fourteenth Amendment aspects of this case, we suggest that they go further and leave room for a self-incrimination claim such as is made here.

The privilege against self-incrimination is violated when an accused, against his will, is made to supply evidence for use in his prosecution.

Schmerber, as did *Holt* v. *United States,* 218 U.S. 245 (1910) before it, exempted from this prohibition certain "real or physical evidence" obtained through the use of the body of the accused. We suggest that *Schmerber* and *Holt* are, or should be limited, to those situations where the evidence sought and obtained is an unalterable objective truth, or at least as close to it as human frailty permits. For example, if a type of test for intoxication had been administered which recorded not the scientific truth of the accused's blood-alcohol ratio but rather the clarity of his mental or physical responses to given stimuli and proof was offered that the responses were consistent with intoxication but not inconsistent with nervousness or external conditions under which the evidence-gathering test was given, then we suggest that *Schmerber* would not apply.

The production of Petitioner for corporeal and voice identification at the evidence seeking confrontation cannot be separated from the conditions under which the confrontation took place. It was those conditions, in part forming the basis for our independent claim for relief under the Sixth and Fourteenth Amendment, which takes this case out of the testing for the objective fact permitted by *Schmerber.*

The Relief Sought

The panel decision in *Stovall* ordered a retrial without the use of the evidence of prior identification, leaving open to defense counsel the option of referring to it on cross examination of Mrs. Behrendt in order to show or suggest that her presumed in-court identification at the retrial was based upon her recollection of seeing Stovall in the hospital room rather than in her home. Upon the rehearing, Chief Judge Lumbard in his concurring opinion (R. 53) indicates that the hospital identification possibly "psychologically colored" the in-court identification and that if the prior identification was improper then the only consistent way of dealing with the situation would be to bar *both* the prior identification and the in-court identification. This view was adopted by the Fifth Circuit in *Wade* v. *United States, supra.*

Having only asked in the court below for a retrial without the testimony relating to the prior identification we are uncertain as to our standing to ask for the broader relief granted in *Wade.* However, it would seem that consideration should be given to whether there is not a mid-point between the conflicting views. We suggest that if the evidence of this prior identification is constitutionally inadmissible then a *voir dire* could be held at which the extent of the impact of prior identification upon the ability to presently identify could be developed. If the prosecution can establish that the ability to presently identify is free and independent of the prior identification then the evidence should be allowed. See, *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385 (1920).

Conclusion

For the foregoing reasons, the judgment of the court of appeals should be reversed and the case remanded to the district court with directions to sustain the writ of habeas corpus unless Petitioner is retried within a reasonable time.

Respectfully submitted,

LEON B. POLSKY
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